IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.18021 of 2006

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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GUNVANTRAY VALLABHDAS DHORDA - Petitioner(s)
Versus
TARABEN NATWARLAL DHORDA - Respondent(s)

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Appearance :
MR DC SEJPAL for Petitioner(s) : 1,
MR AJ SHASTRI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 20/09/2006
ORAL JUDGMENT

1. Though the petition is styled as a petition under under Articles 226 and 227 of the Constitution of India, in effect, is a petition under Article 227 of the Constitution. The petition challenges the order dated 12th June, 2006 made below application Exh.13 in Regular Civil Suit

No.178 of 2005 by the Court of Principal Civil Judge, Jetpur. The petitioner herein is the original defendant while respondent herein is the original plaintiff. Hereinafter, for the sake of convenience, the parties shall be referred to as per their respective description in the suit.

2. The plaintiff filed the suit with a prayer for declaration that partnership firm by the name of Avinash Processors, wherein the plaintiff and the defendant were partners, is to be dissolved through arbitration proceedings and till the arbitrator does not record an award the defendant does not have any right or title to use and occupy the properties of the partnership firm, either on his own or under any other name.

3. Vide application Exh.13 the defendant moved the trial Court calling upon the trial Court to frame a preliminary issue “whether the trial Court has jurisdiction to try the suit” and decide the same considering the provisions of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 (the Arbitration Act, 1996). In other words, it is the say of the defendant that either the District Court or the

High Court would be the only Court which would have jurisdiction and no other Court including the trial Court would have jurisdiction. The said application was resisted by the plaintiff by filing objections Exh.15 wherein the contentions were raised that : (1) incorrect facts have been stated in the application Exh.13, (2) the application ought to have been moved before the summons had been served, (3) under which law such an application has been moved has not been stated and, (4) on facts the suit was to prohibit the defendant from conducting the business and using the assets of the partnership firm and was thus not amenable to arbitration proceedings. That, therefore, this was an issue wherein evidence was required to be led, the issue being a mixed question of fact and law.

4. After hearing the parties the trial Court has made the impugned order on 12th June, 2006 rejecting application Exh.13.

5. Heard Mr.D.C. Sejpal, learned advocate appearing on behalf of the defendant, and Mr.A.J.Shastri, learned advocate appearing on behalf of the plaintiff. RULE.

Mr.Shastri is directed to waive service of Rule.

6. Mr.Sejpal has assailed the impugned order stating that the trial Court has misdirected itself in law and infact the plaintiff has already moved the High Court by way of Arbitration Petition No.29 of 2006 wherein same issues were raised by the plaintiff as raised in its reply Exh.15 before the trial Court.

7. Mr.Shastri has vehemently opposed the petition and submitted that in exercise of powers under Article 227 of the Constitution this Court should not interfere in an order which is otherwise a reasonable order in the facts and circumstances of the case merely because this Court may be in a position to record a different finding on the same set of facts and circumstances. According to him, the subject matter of suit is post dissolution, namely, after the notice for dissolution was given and in the circumstances, the partnership deed Clause No.14 for settling the dispute through arbitration cannot be invoked. According to him, the matter regarding appointment of arbitrator is only qua the terms and conditions mentioned in the partnership deed and any dispute beyond that, like the present one, cannot form

the subject matter of arbitration and, therefore, the trial Court had rightly rejected the application Exh.13. It was further submitted that the order of the trial Court has to be read as a whole and merely because it is not palatable it does not become an incorrect order. In support of the submission he has placed reliance on decision of Bombay High Court in the case of *Usha Sales Ltd. Vs. Malcolm Gomes & Ors.*, AIR 1984 BOMBAY 60.

8. As can be seen from the impugned order made by the trial Court even when one reads the entire order as a whole one does not find any finding, much less any reasoning, as to whether or not provisions of Section 2(1)(e) of the Arbitration Act, 1996 are, or are not, applicable. Except for referring to the said provisions in the form of contention raised by the defendant the entire order is silent. The trial Court has referred to irrelevant issues like the plaintiff not agreeing with the names of the arbitrators furnished by the defendant; the defendant has not moved any application along with copy of the partnership deed for making a reference to the arbitrator; there is no dispute regarding challenging any award made by the arbitrator in the suit; and lastly,

after referring to Section 8(1) of the Arbitration Act, 1996, the trial Court says that the question as to jurisdiction cannot be decided without recording evidence as the issue is a mixed question of law and fact.

9. At the cost of repetition, it is required to be stated that the trial Court has not appreciated the controversy brought before it and hence, has not recorded any finding qua the same. If the trial Court was of the opinion that provisions of Section 2(1)(e) of the Arbitration Act, 1996 are not applicable it was open to the trial Court to record so, but a provision of law to which its attention is specifically invited and is called upon to record a finding cannot be ignored or brushed aside in the manner the trial Court has done.

10. The decision of the Bombay High Court which is based on provisions of Order XIV Rule 10(2) of the Code of Civil Procedure, on which reliance has been placed on behalf of the plaintiff, cannot sustain the impugned order. The issue raised by the defendant was not one which could be decided along with other issues when

the suit was tried, e.g. issue of limitation. The question raised and posed for answer before the trial Court pertains to the jurisdiction of the trial Court to proceed with the suit and once there is a specific provision, it was incumbent upon the Court to record a finding whether that provision was applicable to the facts of the case or not. That could not be left at the stage of trial, because, ultimately, if the trial Court comes to the conclusion that it does not have jurisdiction to proceed with the suit that cannot form part and parcel of the subject matter of trial. It has to be treated as an independent preliminary issue, examined at the threshold and a decision arrived at. The trial Court has singularly failed in its duty.

11. It is also necessary to note that in Arbitration Petition No.29 of 2006 filed by the plaintiff in this Court it is averred in Paragraph No.7:

> "7. From the above said correspondence and the averments made in the notices following things are crystal clear:
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> A) Partnership was a Partnership at Will.
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> B) Termination/dissolution of the partnership and resolving the dispute was with the help

of arbitrators.

C) Dissolution/termination is accepted by the respondent.

D) Respondent knowingly and intentionally given the names of those persons as arbitrators who are not present in India.

E) Respondent is not complying the terms and conditions of the partnership deed and is not coming forward with clean hands.

F) The respondent is using the business premises and benefits thereof as everything is in control of the respondent.

G) The wife of the respondent again betrayed by changing name of the business in the name of the respondent for which they (respondent and his wife) are facing criminal case u/s 406, 420 of I.P.C.

Then in prayer clause:

“12. It is, therefore, prayed that:

a) Your Lordship may be pleased to kindly appoint any arbitrator to resolve the dispute/s between the parties.

b) Pending admission and disposal of the same kindly direct the respondent to restrain him/his agents, servants by using the premises and business thereof forthwith and appoint any court receiver at the cost of the petitioner.

Thus it is absolutely clear that the plaintiff is adopting contrary stands in different proceedings and cannot be

permitted to do so.

12. In the aforesaid facts and circumstances, the impugned order cannot be permitted to stand and is hereby quashed and set aside. The trial Court not having decided the issue raised by the defendant, in the interest of justice and in the fitness of things, application Exh.13 stands revived and the trial Court shall, after hearing both the sides, without permitting any further evidence to be led in this regard, decide the issue raised by the defendant in application Exh.13. The trial Court shall take note of the aforesaid averments made in Arbitration Petition No.29 of 2006 while disposing off application Exh.13.

13. The petition is allowed accordingly. Rule made absolute There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

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Bhavesh*